

ii. round up the Chargeable Time for each call to the next whole minute and charge the plaintiff and the members of the class for the increased time resulting from that rounding up;

C. Enjoining the defendant from:

i. charging the plaintiff and the members of the class for the time associated with calls received on their cellular phones; and

ii. rounding up the Chargeable Time for each call to the next whole minute and charging the plaintiff and the members of the class for the increased time resulting from that rounding up;

D. Awarding damages to the plaintiff and the members of the Class, with prejudgment interest;

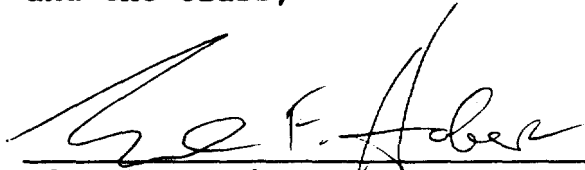
E. Awarding the plaintiff and the members of the Class triple their damages pursuant to M.G.L. Chapter 93A, Sections 9 and 11;

F. Awarding the Plaintiff and the members of the Class their costs and expenses of this litigation, including reasonable attorneys' fees, accountants' fees and experts' fees and other costs and disbursements; and

G. Awarding the Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

THE PLAINTIFF DEMANDS A TRIAL BY JURY

Submitted by the attorneys for
the Plaintiff, Jill Ann Smilow,
and the Class,

A handwritten signature in black ink, appearing to read "E. F. Haber", is written over a horizontal line.

Edward F. Haber; BBO No. 215620
Thomas G. Shapiro; BBO No. 454680
Thomas V. Urmey, Jr.; BBO No. 506620
Andrew Rainer; BBO No. 542067
Shapiro Haber & Urmey LLP
75 State Street
Boston, MA 02109
(617) 439-3939

Dated: February 11, 1997

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf And
On Behalf Of All Others Similarly Situated
Plaintiff,

Case Number 97-10307-REK

v.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., d/b/a CELLULAR ONE
Defendant.

**STIPULATION TO EXTEND TIME
TO FILE A RESPONSIVE PLEADING**

The undersigned parties hereby stipulate and agree that the time within which the
Defendant Southwestern Bell Mobile Systems, Inc. ("Cell One") may answer or otherwise
respond to the Complaint shall be extended up to and including March 21, 1997.

JILL ANN SMILOW, On Her Behalf
And on Behalf Of All Others Similarly
Situated.

SOUTHWESTERN BELL
MOBILE SYSTEMS, INC.

By Their Attorneys,

Thomas G. Shapiro (one)
Thomas G. Shapiro, Esquire
BBO No. 454680
Shapiro, Haber & Urmy LLP
75 State Street
Boston, MA 02109
(617) 439-3939

By Its Attorneys,

Marcus E. Cohn
Marcus E. Cohn, P.C.
BBO No. 090820
Tristin L. Batchelder
BBO No. 561028
Peabody & Brown
101 Federal Street
Boston, MA 02110
(617) 345-1000

DATED: March 7, 1997

BOS1:36234_1

3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, on her behalf and
on behalf of all others similarly situated,

Plaintiff,

vs.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC. d/b/a CELLULAR ONE,

Defendants.

Case No. 97-cv-10307-REK

**PLAINTIFF'S OBSERVATIONS REGARDING PETITION FOR
DECLARATORY RULING FILED BY THE DEFENDANT
ON NOVEMBER 12, 1997 WITH THE FEDERAL COMMUNICATIONS COMMISSION**

On November 13, 1997, plaintiff's counsel was served with a copy of the Petition for Declaratory Ruling, which the defendant apparently filed with the Federal Communications Commission yesterday, November 12, 1997. The defendant has previously moved this Court to delay the ordinary litigation of this action pending a decision by the FCC on a petition which the defendant planned to file. That motion was denied.

The defendant had known that plaintiff claims that the defendant's billing practices violate the plaintiff's contract with the defendant, since July 18, 1996, when plaintiff's counsel served a demand letter under Chapter 93A § 9(3) on the defendant. (See ¶ 42 of the Class Action Complaint). It has taken the defendant sixteen months

since it received that demand letter, and eight months since the filing of this action, to file the petition.

Based upon plaintiff's counsel's quick review of the Petition, it is apparent that the petition provides no basis whatsoever for any further delay in the ordinary prosecution of this action. This is because the defendant's FCC Petition seeks generic approval by the FCC of the practice of rounding up calls to the next whole minute and charging for calls received by a cellular phone. **In its Petition, the defendant completely ignores and fails to inform the FCC of the existence of the contract, drafted by the defendant, upon which the claims at bar are based.**

Cellular One sells cellular service pursuant to written "form" contracts ("the Contract"), which are drafted by the defendant. A copy of the contract between the plaintiff and Cellular One ("the Contract") is Exhibit 1 to the Class Action Complaint. (Class Action Complaint, ¶ 12). Relevant provisions of the Contract read as follows:

1. ... Notwithstanding the terms and provisions of any other agreement which are inconsistent with this agreement **these terms and conditions constitute the entire agreement between the parties.**
2. C1 [Cellular One] will provide Customer with cellular telephone service (the "Service") and Customer agrees to pay for the Service and all other charges **on the terms and conditions herein....**
13. **Chargeable time for calls originated by a Mobile Subscriber Unit** starts when the Mobile Subscriber Unit signals call initiation to C1's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular

system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

(Emphasis added).

Contrary to paragraph 13 of the Contract, the defendant not only charges the plaintiff and the members of the class for cellular telephone calls which are "originated by" their cellular phone or "Mobile Subscriber Unit," it also charges them for time of calls received by their cellular phones. (Class Action Complaint ¶¶ 16 and 17).

Also contrary to paragraph 13 of the Contract, which provides that plaintiff is to be charged only for the period from when "the Mobile Subscriber Unit signals call initiation to C1's facilities" to "when the Mobile Subscriber Unit signals disconnect to C1's facilities and the call disconnect signal has been confirmed", (Class Action Complaint ¶ 18), Cellular One "rounds up" the actual time used by plaintiff and the other class members to the next whole minute, and charges for that entire whole minute. (Class Action Complaint ¶¶ 18 and 19).

That is all this case is about. All that has to be decided on the liability aspect of this case is whether the defendants' admitted conduct:

- a. in charging for calls received by, as well as those originated by, the cellular phones of the plaintiff and the class; and
- b. rounding up the time of each call to the next whole minute and charging for that whole minute:

1. Breached the unambiguous, inclusive Contract, drafted by the defendant, because they were not permitted by, and were in conflict with, the Contract (Count I of the Complaint);

2. Were "unjust" practices, in violation of § 201 (b) of the Communications Act, because they were not permitted by, and were in conflict with, and were a breach of, the Contract (Count II of the Complaint); and

3. Were unfair and deceptive acts and practices, in violation of M.G.L. Ch. 93A, § 2(a), because they were not permitted by, were in conflict with, and were a breach of, the Contract (Count III of the Complaint).

The underlined phrases in the numbered paragraphs above set forth the key factual aspect of this case which the defendant purposely ignores in arguing for a reference to the FCC. Plaintiff's only claim that the defendant has violated § 201 (b) of the Communications Act is that the defendant's practice of charging for incoming calls and rounding up each call to the next minute, is an "unjust" practice, in violation of § 201 (b), because they were not permitted by, and were in conflict with, and were a breach of, the Contract. The defendant has purposely avoided placing that issue before the FCC.

Plaintiff makes no general or abstract attack on either of those billing practices. Plaintiff doesn't complain that they produce too much revenue for the defendant; are an unfair exercise of the defendant's economic power; or should be prohibited for any other social, political, moral, philosophical or economic reason. Plaintiff only attacks those billing practices, as violations of § 201(b), because the defendant agreed, in the Contract it drafted, not to charge in that way.¹

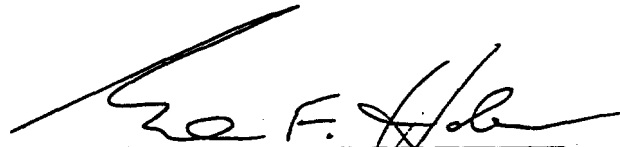
¹ Paragraph 36 of the Complaint alleges that "The defendant's conduct constitutes unjust practices in violation of § 201 (b) of the Communications Act (47 U.S.C. § 201(b))." The Complaint does not allege violation of the more general proscription in that section

Under the circumstances, it is apparent that defendant has raised the entire issue of deference to the FCC as a means to delay the ordinary litigation of this action. This is apparent from the fact that it took the defendant sixteen months after plaintiff first complained to the defendant for the defendant to file the petition and from the fact that the petition, as filed, completely ignores the contract, and hence, would do nothing to resolve the issues in this case, as articulated above.

For these reasons, based upon the brief review of the defendant's FCC petition that time permitted, plaintiff submits that this action be permitted to proceed apace.

Dated: November 13, 1997

Respectfully submitted by the attorneys for the -
plaintiff,



Edward F. Haber BBO No. 215620
Thomas G. Shapiro BBO No. 454680
Shapiro Haber & Urmy LLP
75 State Street
Boston MA 02109
(617) 439-3939

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE
DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD
FOR EACH OTHER PARTY BY MAIL-HAND-FAX ON 11/13/97



of the statute against "unreasonable" practices.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf And
On Behalf Of All Others Similarly Situated
Plaintiff,

v.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., d/b/a CELLULAR ONE
Defendant.

Case Number 97-10307-REK

**CELLULAR ONE'S MOTION TO DISMISS
THE CLASS ACTION COMPLAINT**

Defendant, Southwestern Bell Mobile Systems, Inc., doing business as Cellular One ("Cellular One"), hereby moves this court to dismiss or stay plaintiff's, Jill Ann Smilow, class action complaint pursuant to Fed.R.Civ.P. 12(b)(6), and to refer the matter to the Federal Communications Commission for resolution. The grounds for this motion are that, under the doctrine of primary jurisdiction and relevant federal case law, this Court should defer adjudication of the issues raised in Plaintiff's complaint pending initial determination by the Federal Communications Commission, as set out in the accompanying memorandum of law in support of this motion.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), Cellular One requests oral argument of this motion. Defendant suggests 20 minutes per side will be sufficient.

4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf
And On Behalf Of All Others
Similarly Situated,

Plaintiff,

VS.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., Doing Business
As Cellular One,

Defendant.

Civil Action
No. 97-10307-REK

STIPULATION

The undersigned parties, through their counsel, hereby stipulate and agree that good and sufficient service of process was effected on Southwestern Bell Mobile Systems, Inc. doing business as Cellular One on February 11, 1997.

The parties also stipulate that the defendants shall have until March 11, 1997 to answer or otherwise respond to the complaint.

Counsel for the Plaintiff:

Edward F. Haber

Edward F. Haber; BBO No. 215620
Shapiro Haber & Urmy LLP
75 State Street
Boston, MA 02109
(617) 439-3939

(2)

Approved.

Hester, D. J.
2-28-97

Jenna M. Cull
By the Court
Deputy Clerk

Counsel for the Defendant:

Marcus E. Cohn

Marcus E. Cohn; BBO No. 090820
Peabody & Brown
101 Federal Street
Boston MA 02110
(617) 345-1000

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf And
On Behalf Of All Others Similarly Situated
Plaintiff,

v.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., d/b/a CELLULAR ONE
Defendant.

C.A. No. 97-10307-REK

CELLULAR ONE'S MOTION TO STAY
THE CLASS ACTION COMPLAINT

Defendant, Southwestern Bell Mobile Systems, Inc., doing business as Cellular One ("Cellular One"), hereby moves this Court, pursuant to Fed.R.Civ.P. 7(b)(1)¹ to stay further proceedings in this action, including all pre-trial discovery pending consideration of the issues raised in Plaintiff's Complaint by the Federal Communications Commission. As grounds for this motion,² Cellular One States that:

1. Under the doctrine of primary jurisdiction and relevant federal case law, this Court may defer adjudication of the issues raised in Plaintiff's complaint until after an initial determination by the Federal Communications Commission;
2. This Court has authority to refer the matter to the Federal Communications Commission for an initial determination. New England Legal Foundation v.

¹ Cellular One originally moved for a stay pursuant to Fed.R.Civ.P. 12(b)(6), relying upon American Telephone & Telegraph Co. v. IMR Capital Corp., 888 F.Supp. 221, 244 (D.Mass. 1995) (where the Court dismissed a claim based upon primary jurisdiction pursuant to Fed.R.Civ.P. 12(b)(6)). This motion under Fed.R.Civ.P. 7(b)(1) is in response to this Court's Order, dated July 11, 1997, inviting Cellular One to present its arguments under Rule 7.

² Cellular One also relies upon, and incorporates herein by reference, its Memorandum of Law in Support of Cellular One's Motion to Dismiss, filed, originally, with its Fed.R.Civ.P. 12(b)(6) motion.

Massachusetts Port Authority, 883 F.2d 157, 171 (1st Cir. 1989) ("When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decisions as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved.");

3. Cellular One respectfully submits that, until an initial ruling by the Federal Communications Commission, class action discovery, as proposed by the Plaintiff, may result in an unnecessary waste of resources for both parties, for if the practices complained of by the Plaintiff are found by the Federal Communications Commission to be just and reasonable, the core issues raised in Plaintiff's Complaint will be resolved, thus simplifying the resolution of the claim.

WHEREFORE, Cellular One requests that this Court:

- a) Stay all proceedings, including Cellular One's responsive pleading requirement and all discovery in this action, until further order of this Court;
- b) Enter any other award that it deems just and reasonable.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., d/b/a CELLULAR ONE

By Its Attorneys,



Marcus E. Cohn, P.C.
BBO No. 090820
Tristin L. Batchelder
BBO No. 561028
Jonathan Sablone
BBO No. 632998
Peabody & Brown
101 Federal Street
Boston, MA 02110
(617) 345-1000

Dated: July 22, 1997

1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *

JILL ANN SMILOW, on her behalf
and on behalf of all others
similarly situated

CIVIL ACTION
NO. 97-10307-REK

vs.

SOUTHWESTERN BELL MOBILE
SYSTEMS, INC., d/b/a/ CELLULAR
ONE

Courtroom 11
Thursday, Nov. 13, 1997
Boston, Massachusetts

* * * * *

H E A R I N G

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff:

SHAPIRO, HABER & URMY, LLP
By: Edward F. Haber, Esquire
75 State Street
Boston, Massachusetts 02109

For the Defendant:

PEABODY & BROWN
By: Marcus E. Cohn, Esquire
Jonathan Sablone, Esquire
101 Federal Street
Boston, Massachusetts 02110

Court Reporter:

Timothy J. Willette, RDR
Official Court Reporter
U.S. District Court
603 Post Office & Courthouse
Boston, Massachusetts 02109
617.248.0604

2 1 (3:00 p.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 THE CLERK: This court is now in session.
5 Please be seated.

6 This is Civil Action Number 97-10307, Smilow
7 against Southwestern Bell.

8 THE COURT: All right. The immediate matter
9 before me for hearing is Cellular One's Motion to Stay the
10 Class Action Complaint. I'll hear counsel on that motion.

11 MR. COHN: Thank you, your Honor. My name is
12 Marcus Cohn, and together with Jonathan Sablone we represent
13 Cellular One.

14 The Court has had this motion under consideration
15 and I'm advised by your clerk that you just recently
16 received a copy of the petition that has been filed on
17 Southwestern Bell Mobile Systems, Inc.'s behalf with the
18 Federal Communications Commission. It was filed yesterday
19 and, based upon the statements, I'm sure the Court has not
20 had a chance to review that petition.

21 THE COURT: I have looked at it. I think I've
22 got a good sense of what's in it.

23 MR. COHN: Based on the Court's opinion and
24 the discussion that we had last time, we feel that at least
25 in the first instance the Commission ought to have the

2 1 opportunity to consider the issues that the Court discussed
2 and which we have discussed in that petition, and based on
3 that we think that it would be prudent and efficient for
4 this Court to stay this action.

5 THE COURT: Thank you.

6 MR. HABER: Good afternoon, your Honor.

7 I just received a copy of the petition about noon
8 today, your Honor. I have had a chance to review it within
9 the amount of time that was available to digest it and
10 prepared what I entitled "Plaintiff's Observations ..."
11 regarding it that I gave to your clerk a few minutes ago.

12 I would respectfully submit that this petition
13 and the complaint that we have filed in this court are ships
14 passing in the night. The petition as filed seeks a generic
15 comment by the Commission on the practice of rounding --
16 generic comment on the practice of charging for calls
17 received.

18 As we explained previously in this case, your
19 Honor, and is clear from the complaint, and as we lay out
20 again in our observations, this case is not about any
21 general objection or reasonableness objection to those two
22 practices. This case is narrow. It is based solely on the
23 question and the only question that I submit needs to be
24 resolved in this case: do those two practices of rounding
25 up and charging for incoming calls breach the contract that

2 1 the defendant drafted and entered into with the plaintiff
2 and the members of the class. We submit the contract is
3 unambiguous. We submit it does breach it. That's the only
4 issue here.

5 This submission to the FCC doesn't mention the
6 contract at all, doesn't put in issue at all before the FCC
7 anything that is material to the resolution of this case.
8 We could wait for two, three, four years for the FCC to act
9 on this petition and we will be right back here no further
10 along in resolving the issue that is going to determine this
11 case, whether the contract was breached.

12 With all due respect to my brother, I
13 respectfully submit that now, 16 months after we first sent
14 a demand letter to the defendants and eight months after
15 this complaint was filed, for the defendants on the eve of
16 this hearing to be filing a petition that ignores the issue
17 in this case and use that as its basis for further staying
18 this action is designed for delay.

19 I submit, your Honor, that this case can be
20 efficiently brought to resolution within a comparatively
21 short period of time. I would ask the Court to schedule a
22 briefing schedule for class certification. As I've
23 indicated in prior papers submitted, we think that this is a
24 case that can be resolved on summary judgment. It's just a
25 contract interpretation question. That's an issue of law

1 for this Court. So I respectfully submit that there is no
2 reason for a stay of this action.

3 And one more observation. This case can go on in
4 the ordinary course for a long time before anything your
5 Honor does would in any way finally resolve the issue, so we
6 can move forward with class certification and we can get the
7 class certified. We can send out notices. All of those
8 things can happen and the FCC can be doing what it wants on
9 this petition, but it won't matter, because even if the FCC
10 gives the defendants everything they're asking for in this
11 petition, it doesn't resolve the question.

12 And finally, I would add, your Honor, that as I
13 understand the law, we, meaning the plaintiff here, are not
14 in a position to ask the Commission to do something else,
15 because the law is that a grievant under the Communications
16 Act has to choose their forum. They can choose the federal
17 court or they can choose the FCC. They're not permitted to
18 choose both. We chose this court. We'd like this case to
19 proceed.

20 THE COURT: Well, let's take the motion that
21 is before me first.

22 I issued a memorandum and order on July the 11th.
23 Now, on November 13th when I'm about to have a hearing I am
24 advised for the first time that Cellular One, or
25 Southwestern Bell, gets around to filing something before

1 the FCC. And what is filed when I look at it and look at
2 the exhibits attached to it is not something that's filed
3 because of something that's happened fairly recently that
4 would affect it in any way, but goes back for years and
5 doesn't fill in the time in between and doesn't mention this
6 case and this contract. Well, it may mention this case. I
7 guess it does. It doesn't mention the contract involved in
8 this case.

9 Now, that on its face is simply an effort to get
10 a delay in this case and so I'm not going to allow that. So
11 docket number 13, Cellular One's Motion to Stay the Class
12 Action Complaint, is denied.

13 Now, neither am I going to allow the plaintiff to
14 control the docket of this Court in the way you want to do
15 it. And I have given you notice in the memorandum of July
16 the 11th that if you want to file a motion for class action
17 certification and take your chances on doing it right now,
18 you may do it and I'm probably going to deny it and that
19 will be it. It is not a matter that I expect that I will be
20 able to decide without any understanding of factual
21 circumstances beyond what appears on the record in this
22 case.

23 I understand many practical reasons why you would
24 like this to be a class action, but I am also aware of many
25 practical and legal reasons why it might be very

1 inappropriate to make this a class action and, if it becomes
2 a class action, very difficult to determine who can properly
3 represent the class and how many subclasses we might need
4 and such things, because this is very likely not going to be
5 a matter that will be controlled by federal law alone. And
6 if it's not controlled by federal law alone, then the
7 interpretation, enforceability of this contract and other
8 matters associated with what the remedy might be are very
9 likely to be affected by not the law of one state or two
10 states or a few, but many states, and the notion that I
11 could take this case and adjudicate all of the claims at
12 once is really extraordinarily unlikely, extraordinarily
13 unlikely.

14 MR. HABER: May --

15 THE COURT: So you don't get a class action
16 certification just because you want one or because you filed
17 the action purportedly as a class action. I'm ready to
18 decide the class action question as soon as you think it's
19 ready to be decided, but you make your choice at your peril
20 if you want it done early without any kind of discovery or
21 factual development of the matter.

22 MR. HABER: May I advise the Court of
23 something that I think your Honor is not aware?

24 THE COURT: You may.

25 MR. HABER: Based upon the document production

1 that we discussed at the last hearing in this case and the
2 defendants have subsequently produced, it appears that the
3 only geographic area where the contract was used by
4 Southwestern Bell that is like the contract that the
5 plaintiff in this case was given is in Massachusetts and
6 conceivably a little bit of Rhode Island, so the kinds of
7 issues that your Honor was addressing in terms of there
8 being numerous different states' laws that might be
9 implicated probably will not be a problem given the
10 information that I've received. We probably will only be
11 dealing with Massachusetts state law and perhaps one other
12 state.

13 THE COURT: I am skeptical. Now, I understand
14 that's your position. I think you made a similar argument
15 to me, didn't you, at an earlier time?

16 MR. HABER: No, your Honor.

17 THE COURT: You may not have made it with the
18 same expression of certainty that you've just put to it now,
19 but we discussed this question before of how many states'
20 laws I was going to have to be thinking about in order to
21 decide this case, and I think we had some discussion about
22 whether if we have to have subclasses one of them might be
23 either Massachusetts or Massachusetts and Rhode Island or
24 something similar to that.

25 MR. HABER: If I recall correctly, that

1 discussion was the issue of whether the various states' laws
2 were similar. What I'm saying now, your Honor, based on the
3 information that I didn't have at the time of the previous
4 hearing is, it appears that at least the vast majority of
5 the putative members of the putative class would be
6 residents of Massachusetts, so the issue would not get
7 complicated by the issue your Honor was talking about in
8 terms of applying different substantive state laws.

9 THE COURT: Well, you see, it doesn't
10 eliminate the problem for you to tell me that the vast
11 majority will be in one state. That still makes it
12 extremely dubious that I should allow a class action with a
13 class that has members scattered around elsewhere whose
14 rights I cannot adjudicate in one time. I have to
15 adjudicate part of the case and then start moving down
16 dealing with a number of other individuals one by one or
17 else kick them out of the class.

18 MR. HABER: I understand what you're saying,
19 your Honor, and we'll pay a lot of attention to it.

20 THE COURT: All right. Now, the one thing I
21 am clearly doing today, as I have done, is to deny Cellular
22 One's motion to stay. I am not approving what you are
23 suggesting to me as your way of proceeding.

24 Now, I will hear both of you as to what you
25 propose is an appropriate schedule for me to fix as to what

1 happens next in this case before me. I take it what you
2 want to do is to address the class action certification
3 next, is that right?

4 MR. HABER: Well, before I could do that there
5 are a couple of loose ends vis-a-vis the document production
6 that's been given.

7 THE COURT: What are they?

8 MR. HABER: Reflected in plaintiff's response
9 to Cellular One's response to the hearing which was in
10 docket number 18, your Honor, which was filed on
11 September 30th, the parties do have a difference of opinion
12 as reflected in paragraph 7 of that response. The document
13 production in terms of the contracts that I have received
14 the defendant has limited to what they call retail
15 contracts, individual contracts for one phone, and have
16 excluded any contracts that involve corporate contracts or
17 specialty services contracts. Our view is, your Honor, that
18 those could have the exact same infirmity or the exact same
19 language that the contract that Ms. Smilow had, so we should
20 be able to see those and then make the determination whether
21 to ask you to include those customers of Southwestern Bell
22 in the class or not. We can't do that without the
23 documents.

24 THE COURT: Now, wait a minute. Discovery as
25 bearing upon what I might do I will allow. Discovery that

1 assumes that I am making an implicit ruling as to who's
2 going to be in a class, I'm not even making a ruling there
3 will be a class.

4 MR. HABER: I understand that, sir. I
5 understand.

6 THE COURT: All right. Now, how do you
7 respond to paragraph 7, docket number 18, of the Plaintiff's
8 Response to Cellular One's Response to Court's Order
9 Regarding Informal Discovery of Contracts Subject to
10 Plaintiff's Class Action Complaint?

11 MR. COHN: Let me just find it, your Honor.
12 If you could just tell me what issue you're referring to, I
13 can address it. I don't know them by paragraph.

14 THE COURT: Let me hand you -- well, have you
15 got it?

16 MR. COHN: Yes. This is the corporate
17 contracts and specialty services contracts? It's a very
18 simple position. The plaintiff has brought suit on behalf
19 of Ms. Smilow and others similarly situated. She is a
20 retail customer. They have no business customers. The
21 business contracts --

22 THE COURT: I reject that argument.

23 MR. COHN: Well, then you reject it. I would
24 like with the Court's permission to address you very
25 briefly, if you will hear me, on the issue of this filing,

1 because I think some explanation given the amount of work
2 that went into this --

3 THE COURT: No, no. I don't have time to hear
4 you this afternoon. I reject the basis on which you have
5 declined to produce.

6 Now, produce or else. If you don't produce, then
7 I'm going to have a motion before me, I guess, for sanctions
8 and I'll consider it.

9 MR. COHN: If the Court agrees with my
10 brother, then we'll produce it.

11 THE COURT: I'm saying to you that the basis
12 on which you have declined to produce is not supportable, in
13 my view, and I'm rejecting it.

14 MR. COHN: Then we will produce them.

15 THE COURT: All right.

16 MR. COHN: Now, may I just ask the Court one
17 other thing without belaboring this at all?

18 THE COURT: Yes.

19 MR. COHN: A tremendous amount of effort by a
20 lot of lawyers went into the filing of this petition and I
21 know that the Court has not had it and it does not know why
22 it took this long to file it. If the Court does not have
23 time now --

24 THE COURT: It doesn't make any difference
25 what's in it. I am not going to delay an action in this

1 court where the plaintiff is contending they have a right to
2 be here, that they have a choice to be here. I must
3 consider that contention. I cannot assume that you're right
4 and I cannot assume that any other tribunal is going to hold
5 that you're right. I'm not trying to stop any other
6 proceedings. You could have started them a long time ago.
7 You could have started them sooner than now even after you
8 came before this Court.

9 I'm not doing anything at all. I'm not lifting a
10 finger to try to affect what may happen there. I'm simply
11 saying to you I am not going to permit a delay in the
12 proceedings before this Court and my hearing and deciding
13 whether the plaintiff has a right to be here. I'm not going
14 to delay to wait to see what the FCC says. What they say
15 would not necessarily be binding on this Court in any event,
16 and from my previous experience in similar circumstances I
17 think it is unlikely that they'll even try to say something
18 that they purport to make binding on this Court.

19 And so what you're asking me to do is to delay,
20 to wait for something that is very unlikely to happen, that
21 I get directions from that source about what I should do
22 with this case before me. I doubt that they will even
23 address this question that the plaintiff is arguing to me,
24 that the plaintiff has a choice to be in this court instead
25 of there if they want to. Somebody's got to decide that

1 question and I think it probably will have to be decided
2 first in this court subject to review.

3 MR. COHN: On the Court's scheduling issue,
4 since I think that neither Mr. Haber nor myself are prepared
5 to address that issue, I would respectfully suggest that we
6 be permitted to confer and to report back to the Court in an
7 attempt at least to agree upon a schedule of what we both
8 think is appropriate and if we have disagreements, to bring
9 those to the Court.

10 THE COURT: You may. You may.

11 MR. COHN: May I suggest -- what would you
12 say, the first week in January to report?

13 MR. HABER: You mean when we should file
14 something?

15 MR. COHN: Yes, when we should file something.

16 MR. HABER: I think we should even do it
17 quicker than that. Middle of December? How long is it --

18 MR. COHN: My problem, your Honor, is, I have
19 a trial starting December 8th that I'm preparing for right
20 now.

21 MR. HABER: I'm happy to come up with a
22 schedule before then. It shouldn't take long.

23 THE COURT: You know, coming up with a
24 schedule shouldn't take all that much time. I don't see why
25 you can't do it this afternoon.

1 MR. COHN: I don't know what he has in mind,
2 but we'll do it as soon as we can.

3 THE COURT: All right.

4 MR. HABER: Thank you, your Honor.

5 THE COURT: We'll be in recess.

6 MR. COHN: Thank you.

7 THE CLERK: All rise.

8 (Proceedings concluded at 3:22 p.m.)

9 * * * * *

10
C E R T I F I C A T E

I, TIMOTHY J. WILLETTE, Official Court Reporter
for the United States District Court, do hereby certify that
the foregoing pages are a true and accurate transcription of
my shorthand notes, taken in the aforementioned matter, to
the best of my skill and ability.

TIMOTHY J. WILLETTE, RDR
Official Court Reporter
U.S. District Court
603 Post Office & Courthouse
Boston, Massachusetts 02109
617.248.0604